HUGHES-GROESCH
CONSTRUCTION CORP.

VABCA-5448

CONTRACT NO. V554C-684

VA MEDICAL CENTER
DENVER, COLORADO

Lawrence W. Luecking, Vice President, Hughes-Groesch Construction Corp., Wheatridge, Colorado, for the Appellant.

Anna C. Maddan, Esq., Trial Attorney, San Francisco, California; ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

In this appeal, Hughes-Groesch Construction Corporation (HG or Contractor) seeks $1,597,246 in damages from the Department of Veterans Affairs (VA or Government) for breach of Contract No. V554C-684 (Contract). The Contract in the amount of $305,927 was for, among other things, the replacement of the West, South, and North Riser Laundry Chutes at the VA Medical Center, Denver Colorado (VAMC Denver). Numerous problems were encountered and the VA suspended the work on three separate occasions. Appellant argues that the VA breached the Contract by so totally failing in its contract administration obligations that the original 324-day contract took 2,126 days to perform. This breach, Appellant claims, impacted its bonding capacity to the extent that it lost $1,597,246 in profits on other non-VA contracts it would otherwise have obtained. Appellant seeks recovery of these claimed lost profits. A separate suspension of work claim (VABCA-5620) arising under this Contract

was settled by the parties. In settling VABCA 5620, pursuant to the SUSPENSION OF WORK Clause, the VA concedes that it suspended the Contractor for 1,229 days. However, it denies that it breached the Contract and further contends that the "lost profits" from other contracts HG claims it would have otherwise secured are not recoverable under the law and in any event have not been proven. A hearing was held in Denver Colorado. The Record consists of the Complaint, Answer, Appeal File (R4, tabs 1-76), Appellant's Supplemental Rule 4 (R4 Supp, tabs 1-168), Government Trial Exhibits (Exhs. G- 1 & 2), Appellant's Trial Exhibit (Exh. A- 1), and a three volume hearing transcript, together with post-hearing briefs from both parties.

FINDINGS OF FACT

The VA awarded the Contract to HG on September 23, 1990. The award letter required a performance bond in the amount of $305,927, the amount of the Contract. (R4, tab 4) The Notice to Proceed (NTP) was issued on October 19, 1990 and received by HG on October 22. The work was to be completed within 324 calendar days of receipt of the NTP by HG. (R4, tab 5) The Contract work involved demolition of the walls around 3 laundry chutes (west, north, south), tearing out the old laundry chutes, building new fire-rated walls and putting on new laundry chute doors. The linen closets providing access to the laundry chutes were also to have new fire rated walls installed. (Tr. 34-35)

Almost immediately, HG encountered performance problems. All submittals were due within 30 days of the NTP and were to be approved and returned before HG could begin work in the field. The VA did not receive HG's first submittals until the third week after the NTP. According to Appellant, its suppliers took longer than expected to provide their submittals and, the VA took

a long time to review them. (Tr. 32) The submittal process consumed almost 6 months. The Contracting Officer (CO), Ms. Gail Hixon, had problems getting paperwork from HG and thought something was wrong in their organization. (Tr. 441)

In November 1990, HG submitted its asbestos abatement subcontractor for approval as required by the Contract. The VA rejected the proposed contractor for not meeting the 5-year experience requirement. HG's position was that the contractor had well over 5 years experience, mostly in Europe. (Tr. 28) The issue was finally resolved 5 months later in May of 1991 with the VA upholding its initial rejection. During this period, HG submitted another asbestos contractor who was approved by the VA but HG waited to engage the approved subcontractor, holding out hope that the initial subcontractor would be approved.

HG began work in early June 1991. (Tr. 22) Of the 3 laundry chute risers to be done, HG substantially completed the west riser on February 13, 1992. (Exh. A-1) The west riser laundry chute installation met the specifications, and was accepted by the VA. When HG was ready to move to the south riser area, Dr. Wilson, of the VA's Information Resource Management (IRM), expressed concern about the dust and the possible damage to his computers from the construction. IRM had moved into the area after the VA's architect designed the project. (Tr. 439)

While the VA was dealing with Dr. Wilson's dust problem, it also began to receive reports that the west chute was not functioning in accordance with expectations. (Tr. 483) Problems were experienced with door handles and door closures breaking. (Tr. 524) HG replaced the door handles under warranty until it ran out of handles. (Tr. 540) VA officials questioned why a brand new chute was not working as well as the 20-year-old chute it replaced.

The VA believed the door handle failures to be a manufacturing problem. (Tr. 441) Cutler Manufacturing Corporation was the chute door manufacturer. HG had problems getting information from Cutler. (Tr. 442) After much discussion and several meetings occuring over almost a year, the VA decided to use a modified design for the handles. (Tr. 557) The doorstops were also redesigned. The original doorstops allowed the door to open more than 90 degrees thereby bending the plunger, which made it difficult, if not impossible, to shut the door.

Laundry was plugging up in the west chute as often as three times a week. (Tr. 525) The parties made numerous trips to the site and brainstormed the problem. Remarkably, it took each party over a year to figure out what was causing the problem. At the hearing, the parties still disagreed as to the actual cause. The Contractor maintained that the VA was not cleaning out the bottom of the chute causing the laundry bags to pile up in the chute. When the accumulated bags were cleared out, some would remain up in the chute and appear to have stuck there. (Tr. 235) Eventually, the VA observed a towel hanging from the side of the chute, which was supposed to be smooth stainless steel. The VA observed a spur that they believed would slow up a bag and allow the next bag to catch up, and argued this caused the jam. Mr. Jack Enger, the Contracting Officer's Technical Representative (COTR) from November 1992 to the completion of the project, stated that, after HG removed the spur there was no further clogging. (Tr. 527) On cross-examination, he admitted that the west chute did clog on occasion, probably caused by the failure to empty the chute on a regular basis. (Tr. 548)

According to the Contracting Officer's Technical Representative (COTR) Dave Rossi, the breaking handles, closures and clogging were all caused by latent defects or "manufacturer problems."(Tr. 560-579) Because of the problems

experienced with the west riser laundry chute, the VA chose not to proceed with the installation of the other chutes as specified in the Contract. (Tr. 553) The VA did not have the architectural firm that developed the original design make the desired changes because their contract had been completed and additional funds would have to have been obtained. (Tr. 537) The VA chose instead to have HG and Cutler Manufacturing Corp., the door supplier, do the redesign. COTR Jack Enger testified that the VA was more comfortable dealing with the manufacturer, but he testified that it took Cutler "forever" to produce a design and prototype. (Tr. 545)

Concurrently, the VA was dealing with the problems associated with the location of the north and south risers near the "front office" area. It was eventually decided that the existing aluminum shafts would remain, requiring a redesign to ensure that the shafts met fire code requirements.

Mr. Theodore Hughes, President of HG, was not experienced in re-design work and testified that he felt overwhelmed:

> The VA decided to change the scope of work on the remaining north and south risers. On July 30, 1992 the VA "suspended" the work in order to develop the new specifications. The new concept was they wanted a price to leave the old laundry chute in place and not tear the walls down, but make all of the existing walls fire rated, either two-hour-rated walls or one-hour- rated walls. That was presented to us as, "How much would it cost to do this work?" And it was presented to us about as specifically, as I just said, it was two or three sentences, "Please give us a price." We weren't able to do that. There were numerous questions that came up while we were trying to figure out how to -- you can't even put a price together on that. For instance, what's the rating on the wall that's there now? VA would come back to us and say, "Well, we will get back to you." They would get back to us and say, "That wall is nonrated. You need to

> make it a two-hour-rated wall." So then I would say, "Well, how do you want us to do that?" They'd say, "Well, we will get back to you." A period of time would go by and they'd get back to me and they'd, say, "Well, put a drywall shaft liner assembly, for example, on both sides of the wall, and that will make it a two-hour-rated wall." And then I'd say, "Well, we can't get to the backside of that wall. There's no access to it. How can we put that assembly on the backside of the wall?" And they'd say, "Well, we'll get back to you." And it would get back to me, "Well, tear the wall we'll rebuild it like this." It just went on and on and on and on like that until finally towards the end of that period, it was determined that myself and the resident engineer would walk through every single linen closet and a scope of work would be determined in every single one. And that was eventually generated by Hughes-Groesch Construction. We walked through every one of them and made a list of the work that they wanted to do. We put that list to writing and to drawings, and then provided them a price based on that.

(Tr. 35-36)

It was not until December 20, 1994 that HG gave the VA a proposal for the changed work. (Tr. 33) Discussions were held about various aspects of the proposal and some items were repriced but it took 8 months, until August 23, 1995, for the VA to approve HG's proposal. (Tr. 38)

There were 3 suspensions of the Contract during the project: March 2-18, 1992; March 25, 1992-May 24, 1994; and July 6, 1994-August 31, 1995. Suspension No. 1 was issued March 2, 1992 and stated that it was "to allow time for the Contractor and Government to resolve issues with the installed laundry chute." It also stated that it was issued with the understanding that there would be no cost to the Government. (R4, tab 16) Suspension No. 1 was "rescinded" by letter dated March 18, 1992. (R4, tab 17)

Suspension No. 2 was issued on March 25, 1992, "to allow the Government time to resolve issues with the installation on the south riser." Suspension No. 2 was "rescinded" on May 24, 1994, and the rescinding letter asked for a proposal on four changes for the north and south risers. (R4, tab 50) HG responded to the May 24th , letter by stating it would not pursue estimates for the proposed changes until it received payment for Change Orders 13-17. Apparently HG's subcontractors were not going to do anything until they received payment. (R4, tab 51) By that time, CO Dixon had transferred to the Denver VAMC and the new CO, Willia Tribble, knew the change orders had been processed and payment would arrive around July 25, 1994. CO Tribble recommended issuing another stop work order. (R4, tab 51) When the VA's Project Division agreed, Suspension No. 3 was issued July 6, 1994 stating that it "is necessary due to the work scope changes that need to be evaluated prior to submission of a cost proposal to finish this project." An estimated restart date of August 2, 1994 was given. (R4, tab 54) The suspension was lifted over a year later on August 31, 1995. (R4, tab 66) HG eventually signed Supplemental Agreement 18 and completed the remaining work on the Contract without complications. (R4, tab 65) Final inspection and acceptance occurred on October 31, 1996. (R4, tab 72; R4 Supp, tab 168)

On April 17, 1995 Mr. Hughes filed a claim with CO Tribble stating that:

> The balance of the contract is $178,959.16 and is the amount of bonding Hughes-Groesch Construction has not been able to use productively for over 3 years. Hughes-Groesch Construction could have done four $178,959.16 projects per year for 3 years or 12 projects. Twelve $178,959.16 projects is $2,147,510.00 in lost revenues. At 10% overhead and 10% profit Hughes –

> Groesch Construction has not received $450,977.00 in overhead and profit because of the suspension of work.

(R4 Supp, tab 99)

An audit was performed by the Defense Contract Audit Agency (DCAA) and submitted to the CO on June 27, 1997. The audit questioned HG's claimed costs in total. No final decision was issued. HG appealed from the CO's failure to issue a final decision.

Mr. Hughes testified in some detail about Exhibit A-1, a document he prepared a week or so before the hearing that indicated how he reached the now claimed lost profit amount of $1,597,246. It contained data concerning actual revenue figures derived from HG's financial statements. Mr. Hughes used the actual revenue figures to estimate missed revenue and General and Administrative (G&A) costs due to lost bonding capacity resulting from the suspensions. Based on turning over a $324,000 project every 33 days, Mr. Hughes projected revenue, net profit, and the percentage of projected net profit to projected revenues. Using a lost bonding capacity figure of $324,000, Mr. Hughes arrived at the lost profit figure of $1,597,246. The original claim, filed April 17, 1995, was $450,997 for lost profit and overhead.

Mr. Greggory Hettinger was employed by Pinnacle Insurance Company when he first set up an account for HG in 1989. (Tr.369) He was involved in bonding decisions for HG from 1989-1994. (Tr. 393) He said that Pinnacle typically bonded contractors for a $1 million single contract to an aggregate of $2.5 million. Mr. Hettinger could not recall what bonding amounts HG initially had. According to Mr. Hettinger, the primary determinate of how much bonding would be extended is the working capital of the contractor, *i.e*. current assets minus current liabilities. (Tr. 371) Unless there are reasons to the contrary,

as a project becomes complete, an amount corresponding to the percentage of completion would be returned to the contractor's bonding capacity. (Tr. 373)

Mr. Hettinger says he became concerned about the laundry chute project when it began showing up as work in progress and he saw no work was being done. Mr. Hughes told him there were difficulties with the Contract and the administration of the Contract with the owner. (Tr. 376) Mr. Hettinger claims that Pinnacle, as a matter of policy, looks only at the progress being made on a project and "[a]s long as that contract stayed on there and was not making progress, I had to count it against their overall program of credit that I was willing to extend." (Tr. 377, 416) According to Mr. Hettinger, a written suspension, notwithstanding its remedy granting implications, is still considered a potential liability. (Tr. 418) Mr. Hettinger believed HG's aggregate bonding capacity in 1990 was $1.2 to $1.4 million and increased in 1992 to $2 million, contrary to his testimony that he became concerned about HG's bonding capacity "around June of 1991." (Tr. 380)

On cross-examination, Mr. Hettinger stated that, if HG's other projects had been profitable, he would have been able to increase its bonding capacity. (Tr. 395) However, HG was having problems with other contracts, particularly the Aurora Marina project, which was bonded at $1.3 million. Pinnacle conducted a yearly review of the financial statements of bonded contractors to determine their progress. (Tr. 397) Mr. Hettinger testified that he never declined a request for additional bonding from HG and, although downplaying their importance, continued to write recommendation letters on the Contractor's behalf to potential project developers and owners. (Tr. 398) He also stated that having official written suspensions of work did not matter when considering whether to release the bond on a project. If a contractor came in with a good opportunity he could possibly increase their bonding capacity. (Tr. 416, 421)

HG's peak bonding capacity was in 1991, during the Aurora Marina project and was $1.7 to $1.8 million. (Tr. 366, 420, 422) Mr. Hettinger wrote letters in November 1993 stating HG's bonding capacity was $750,000 for single job limit and $1.2 million aggregate. In March 1994 he indicated the bonding capacity was $300,000 single and $750,000 aggregate. (Tr. 405-406) He stated that the VA and other projects caused HG's bonding situation and he considered the VA project a "significant contributing factor." (Tr. 415) Mr. Hettinger's last involvement with HG was in late 1994. (Tr. 401)

On redirect, Mr. Hettinger testified that bonding companies do not keep records of bond commitment programs because they do not want to "post a figure that competitors can try to take a shot at and try to do better with." (Tr. 409) He went on to state that a company's bonding capacity is "never any more than a broad parameter of what you are willing to support. And we never want, as an industry professional, our contractors to think that they don't dare approach us if they have a valid business opportunity that would mean exceeding the amounts that they have been—or parameters that have been discussed." (Tr. 409) There is no evidence in the Record that indicates that any bonding company ever told HG at any time that it would not be bonded for a project on which it wanted to bid.

The HG claim was audited twice by the DCAA. Mr. Gary Spjut, auditor and technical specialist, whose specialty is claims and incurred costs, reviewed the initial audit report performed by an auditor no longer with DCAA. (Tr. 637) Mr. Spjut testified that the audit report stated HG could not demonstrate that their bonding capacity was tied up. He said that after hearing Mr. Hettinger's testimony, he believed the VA project tied up $300,000 of HG's bonding capacity (Tr. 639) Based on the fact that the VA job made a profit, Mr. Spjut testified that it was the other jobs that brought down HG's working capital. (Tr. 645) In 1990,

11 of 29 HG projects were in a loss position; in 1991, 20 out of 43; in 1992, 13 of 34; in 1993, 14 of 29; and in 1994, 33 of 61. The DCAA auditor sharply disputed that the Contractor could have turned over $320,000 in bonding every 33 days. (Tr. 652)

HG filed three appeals with this Board concerning this Contract. VABCA-5382 involved the installation of an elbow and fire door on the west riser. VABCA-5620 was a claim by HG pursuant to the CHANGES, DIFFERING SITE CONDITIONS and SUSPENSION OF WORK clauses, for 1,229 days of suspension, to "recover all additional costs of performance occasioned by the directed changes which suspended its work." The VA acknowledged suspending the Contractor for 1,229 days. Both appeals were settled prior to hearing on this appeal.

Mr. Larry Luecking, Vice-President of HG, represented HG at the hearing and stated that the VA officials were "delightful" and "the record doesn't indicate any degree of obstinacy on the part of Government Officials. It doesn't indicate that they were particularly adverse to the contractor." Luecking added that the VA, acted without "malice or forethought" and was simply unprepared in what they were trying to accomplish. "They were either forced or wishful of changing their minds frequently, which is their right." (Tr. 5)

DISCUSSION

In its Complaint, HG asks that the Board find that the VA breached the contract by suspending the work for unreasonable lengths of time and not seeking more prompt solutions to the problems resulting in maladministration of the contract and abuse of discretion. As a result of this alleged breach, HG stated it had been barred from competing for contracts totaling $2,147,510.

In its Brief, Appellant maintains the issue is "whether the Government's egregious failures to properly administer the instant Contract rise to the level of

blatant failure to cooperate and thus constitute material breach of contract . . . that allow[s] for lost profits." HG claims in its Brief that it was precluded from using $305,927 of its line of bonding capacity which barred it from competing for contracts in the amount of $16,524,000 during the 4.94 years of Contract performance. This is the first time HG has used $305,927, the amount of the bond required by the CO. Appellant argues that the effects of the numerous problems reduced its bonding capacity, impeded, then arrested, HG's growth pattern, diminished its previously established profitable performance pattern, destroyed its efficiency, and resulted in a contract that had no semblance to the original bargain.

Although Appellant acknowledges that it settled its claims for the suspensions and other performance issues and is seeking only lost profits described above, the quantum portion of its brief, in fact, includes costs resulting from inefficiencies, extended G&A costs experienced at the site of the Contract. The Board understands that HG claims for costs of inefficiency and extended G&A were settled as the subject matter of other appeals, and are not before us in this Appeal.

Responding to the Contractor's claim for lost profits on other contracts it was unable to pursue, the VA argues that the Contractor's claim is for remote and consequential damages which it says the courts have consistently denied, *citing* ***Wells Fargo Bank, N.A. v. U.S***. 88 F.3d 1012 (Fed. Cir. 1996); ***Olin Jones Sand Co. v. United States***, 225 Ct. Cl. 741 (1980); ***Ramsey v. United States***, 121 Ct. Cl. 426, 433, *cert. denied* 343 U.S. 977 (1952). The VA maintains that the Appellant is not entitled to such damages, which in any event it has failed to prove.

Appellant's burden of proof is as follows: first, it must establish the nature and extent of the Government breach of contract; second, it must prove that it

suffered some damage; and, third, any damage must be proved with sufficient certainty so that the determination of the amount of damage would not be pure speculation. ***G & H Machinery Co. v. United States***, 16 Cl. Ct. 568, 571 (1989), citing ***Willems Industries. v. United States,*** 295 F.2d 822, 831 (Ct. Cl. 1961), *cert. denied*, 370 U.S. 903, 82 S.Ct. 1249, 8 L.Ed.2d 400 (1962) and ***Boyajian v. United States***, 423 F.2d 1231, 1235 (Ct. Cl. 1970. As the Court said in ***J.D. Hedin Construction Co. v. United States***, 347 F.2d 235, 259 (Ct. Cl. 1965), "the proper measure of damages for defendant's breaches is the amount of plaintiff's extra cost directly attributable to said breaches."

HG argues that the VA's refusal to take corrective actions to end the suspensions and deal with Contract problems may be regarded as a breach of its implied obligation to cooperate with and not hinder the contractor's performance. This obligation is not limited to active interference, but also extends to failure to do something one is obligated to do. Appellant cites us to ***Shawn K. Christensen,*** AGBCA No. 94-200-3, 95-1 BCA ¶ 27,578 (Government misrepresentation and material omission of fact) and to ***Thomas S. Rhoades,*** ENG BCA No. 6097, 95-1 BCA ¶ 27,375, a case in which the Corps of Engineers Board denied a motion for summary Judgment concluding that a hearing was necessary to determine "whether the [Government] unreasonably failed to or unreasonably delayed doing something which was necessary for [the Contractor's] performance of work."

We agree with Appellant that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. However, we cannot find, under these facts, that the VA breached its obligation to cooperate. Although the history of this Contract does not lend itself to a case study of efficient administration of a Federal procurement by the VA, the delays in resolving the redesign of the chute doors and the north and south risers and

the acceptance of HG's proposal for the redesigned work are mutually attributable to both parties. Notwithstanding the fact that formal suspensions of work had been issued, the delays did not result from the VA's failure to cooperate.

However, when the west riser began having problems, the VA did not go to the A/E who designed the project, but rather placed design responsibilities upon a Contractor who was not particularly equipped to accomplish such an assignment. The VA did breach the Contract by expanding it well beyond its scope to transform it from a construction contract to a design-build contract when it placed the entire redesign responsibility on HG. This is a cardinal change to the Contract, in effect a breach of contract. ***Valley Forge Flag Co., Inc.***, VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246; ***Jack Cooper Construction Co., Inc.***, VABCA No. 1663, 84-3 BCA ¶ 17,703; ***Asbestos Transportation Services, Inc.***, ASBCA No. 46263, 98-1 BCA ¶ 29,502. However, HG resolved this breach by execution of Supplemental Agreements. HG did not reserve its right to pursue breach damages and by agreeing to the modification of the Contract, forfeited any rights to pursue claims for additional costs resulting from the cardinal change. Thus, HG fails to prove the first prerequisite necessary to sustain its breach claim since it previously waived its rights to assert a breach of contract relating to the redesign of the risers and the delays attendant thereto.

Similarly, HG has not proven that it actually incurred any damage resulting from the breach. HG never demonstrated that it was ever denied a bond for a job on which it wanted to bid. Mr. Hettinger testified that he never denied them a bond. HG presented no evidence of its bonding situation after Mr. Hettinger left the scene in 1994. HG simply failed to show that any bonding company at any time refused to issue bonds on their behalf on other contracts or

work for any reason, and certainly not because of the obligations under the Contract. Thus, there is no evidence that bonding capacity prevented HG from obtaining new contracts or new work. As stated by boards and courts previously, not every legally wrongful act results in damages being incurred (*injuria absque damno*). Appellant fails to prove that it experienced any damages. Even in a case heard on entitlement only, a contractor must establish liability and at least the fact of resultant injury. See ***Lemar Construction Co.,*** ASBCA Nos. 31161, 31719, 88-1 BCA ¶ 20,429.

Finally, even if HG had proven that the portion of its bonding capacity dedicated to the Contract, in fact, prevented it from obtaining other contracts, the lost profits on these contracts are simply "too remote, speculative and consequential to be compensated as damages." ***Northern Helex Co. v. United States***, 542 F.2d 707, 721 (Ct. Cl. 1975) Receipt or non-receipt of future contracts is both speculative in nature and dependent on many factors not related to bonding. In ***Olin Jones Sand Co. v. United States***, 225 Ct. Cl. 741, 743-44 (1980), the Court of Claims refused to award damages to a company that lost its bonding capacity as a result of Government wrongdoing, and therefore was unable to obtain unrelated contracts because such damages would be too remote and speculative to be recoverable. See also ***Rocky Mountain Construction. Co.,*** 218 Ct. Cl. 665, 666 (1978); ***William Green Construction Co. v. United States***, 477 F.2d 930, 936 (Ct. Cl. 1973), *cert. denied* 417 U.S. 909 (1974).

Lost profit damages were also found too speculative in ***Wells Fargo Bank, N.A. v. United States***, 88 F.3d 1012, 1022 (1996), where the Court observed that its predecessor court, the Court of Claims, "repeatedly refused to award damages for profits lost on transactions not directly related to the contract that was breached." The Federal Circuit in ***Wells*** quoted extensively from ***Ramsey v. United States***, 121 Ct. Cl. 426, 433, *cert. Denied,* 343 U.S. 977 (1952), as follows:

> The profits lost from the corporation's over-all business activities, because of its shortage of capital allegedly occasioned by the Government's failure to pay the contract amounts when due, may not be recovered either. It is important to bear in mind that the corporation's claim is not for the anticipated profits of the contracts in question, but is a claim for the anticipated profits of its entire business enterprise. The lost profits of these collateral undertakings, which the corporation was unable to carry out, are too remote to be classified as a natural result of the Government's delay in payment . . . . [T]here is a distinction by which all question[s] of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement . . . . But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

88 F.3d at 1022-23.

Our own Board in ***Bridgewater Construction Corp.***, VABCA No. 2985, 91-3 BCA ¶ 24,271 has observed that:

> The traditional rule is that in order to recover, [Contractor] would have to show that such damages were foreseeable, or the proximate result of the [defendant's] actions. ***Hadley v. Baxendale***, 9 Exch. 341, 156 Eng.Rep. 145 (1854). Under federal Government contracts law, however, damages must be both foreseeable and the proximate result of the act of the Government. ***Prudential Insurance Co. of America v. United States***, 801 F.2d 1295 (Fed.Cir.1986); ***Gibson***

Forestry, AGBCA No. 87-325-1, 91-2 BCA ¶ 23,874; ***Land Movers, Inc.***, ENG BCA No. 5656, 91-1 BCA ¶ 23,317; ***Shipco General, Inc.***, ASBCA No. 32,830, 90-1 BCA ¶ 22,363.

In the ***Land Movers*** case cited above, the Board wrote:

> As a result of the general rules which limit the breadth of recoverable contractual damages, a significant distinction is made between extra costs and profit relating to the contract at issue and extra costs, damages, or profits relating to other contracts or work. While the Appellant is entitled to a trial to attempt to show entitlement to additional costs or profit on the instant contract, damages arising from other contracts or work have been held, as a matter of law, to be too remote and speculative to be allowable. [citations omitted]
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> * * * * *
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> There is no averment by the Appellant that the Respondent contemplated any effect on the Appellant, outside the framework of the contract underlying this appeal, at the time of contract execution. The record is devoid of any evidence which tends to show the communication to the Respondent at the time of award of knowledge of any special circumstances of the Appellant.
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> Given the current status of the law, which the Board follows in this opinion, the notion that a Federal contractor can recover damages outside the corpus of the Federal contract underlying the claim, may be dangling the carrot that will never be eaten. The Board is aware of no Board or Federal court decision involving a Federal contract wherein lost profits on contracts or

> work on other than the contract at issue actually were recovered. The parties have cited no such case.

See also RECOVERING CONSEQUENTIAL DAMAGES FROM THE GOVERNMENT: AN IMPOSSIBLE DREAM 5 Nash & Cibinic Report ¶20 (1991).

In sum, Appellant's claim is for speculative alleged loss of future contracts and work that comes within the losses of outside business, outside contracts, and general company worth referred to in the above-cited cases.

DECISION

Based on the foregoing the appeal of Hughes-Groesch Construction, Inc., VABCA-5448, pursuant to Contract No. V554C-684, is DENIED.

DATE: **April 20, 2000**

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WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

_____
RICHARD W. KREMPASKY
Administrative Judge

_____
MORRIS PULLARA, JR.
Administrative Judge